

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Everald Keith Nelson,

Petitioner,

vs.

United States of America,

Respondent.

Civil Action No. 8:23-cv-3254-CMC

ORDER

This matter is before the court on Petitioner's Petition for Writ of Mandamus, in which he requests the court order the Attorney General of the United States implement removal proceedings against him under the First Step Act. ECF No. 1. In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(E), D.S.C., this matter was referred to United States Magistrate Judge Jacquelyn D. Austin for pre-trial proceedings and a Report and Recommendation ("Report"). On August 1, 2023, the Magistrate Judge issued a Report recommending this matter be dismissed without prejudice and without requiring Respondent to file a return. ECF No. 8. The Magistrate Judge advised Petitioner of the procedures and requirements for filing objections to the Report and the serious consequences if he failed to do so. Petitioner timely filed objections.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b).

The Report recommends dismissal because Petitioner is not able to meet the “heavy burden” a writ of mandamus requires. ECF No. 8 at 4. Specifically, the Magistrate Judge finds Petitioner has not shown he has a clear and indisputable right to the relief sought or that Respondent has a clear duty to do the specific, ministerial act requested because the Immigration and National Act prohibits deportation while a defendant is incarcerated. *Id.* at 4-5.

Petitioner objects. ECF No. 14. He asserts the Attorney General has an affirmative duty to provide prisoners with Earned Time Credits under the First Step Act to expedite removal proceedings, so that he could receive early release to Immigration Services. *Id.* at 4.

Petitioner cites 8 U.S.C. § 1228(a) as providing an affirmative duty for the Attorney General so that he can bring his writ of mandamus. Section § 1228(a)(3)(A) notes the Attorney General “shall provide for the initiation and, to the extent possible, the completion of removal proceeding . . . in the case of any alien convicted of an aggravated felony before the alien’s release from incarceration for the underlying aggravated felony.” Section (a)(3)(B) notes, however, “nothing in this section shall be construed as requiring the Attorney General to effect the removal of any alien sentenced to actual incarceration, before release from the penitentiary or correctional institution where such alien is confined.” Further, Petitioner’s argument is doomed by the final sentence in § 1228(a)(1), which specifically states “[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.” Accordingly, subsection (a)(3)(A) is of no help to Petitioner given the qualifications in subsection (a)(1) and (a)(3)(B); therefore, the

statute does not create an affirmative duty sufficient to bring a writ of mandamus, as Petitioner suggests. Petitioner's objection is therefore overruled.

After reviewing the record of this matter, the applicable law, the Report and Recommendation of the Magistrate Judge, and Petitioner's objections, the court agrees with the conclusion of the Report the Petition for Writ of Mandamus should be dismissed without prejudice and without requiring Respondent to file a return. Accordingly, the court adopts and incorporates the Report and Recommendation by reference in this Order. This action is hereby dismissed without prejudice.

IT IS SO ORDERED.

s/Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
Senior United States District Judge

Columbia, South Carolina
October 4, 2023